No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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January 8, 2019

QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC. Each Petitioner belongs to a corporate family of entities dedicated to delivering health knowledge products and services that support drug prescribing decisions and patient adherence to medication regimes to improve health. PDR Network, LLC, and PDR Distribution, LLC, are wholly owned subsidiaries of PDR, LLC. PDR Equity, LLC, is a wholly owned subsidiary of PSKW Holdings, LLC. No publicly held corporation holds 10% or more of any petitioner's stock.

Respondent Carlton & Harris Chiropractic, Inc., is a chiropractic medical office located in West Virginia that delivers healthcare services.

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BRIEF FOR PETITIONERS

Petitioners PDR Network, LLC, et al. (collectively, "PDR"), respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–31a) is reported at 883 F.3d 459. The unpublished opinion and order of the district court (Pet. App. 32a–43a) are available at 2016 WL 5799301.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2018. Petitioner timely sought rehearing en banc, which was denied on March 23, 2018. The petition for a writ of certiorari was filed on June 21, 2018, and granted on November 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions principally involved are the Hobbs Act (28 U.S.C. §§ 2341–2351), Section 10(b) of the Administrative Procedure Act (5 U.S.C. § 703), and the provision of the Telephone Consumer Protection Act that defines the term "unsolicited advertisement" (47 U.S.C. § 227(a)(5)). The pertinent text of these provisions is set out in the appendix to the brief.

STATEMENT OF THE CASE

PDR's position in this case proceeds from a simple and natural premise. When Congress vests an Article III court with power to impose liability for an alleged statutory violation, Congress ordinarily intends also to

vest that court with the power to decide the meaning of the statute at issue.

The decision below proceeds from the opposite premise. It takes the Hobbs Act (the "Act")—an ordinary agency review statute, which even the Fourth Circuit recognized to be "nothing unique," Pet. App. 8a (internal quotation marks omitted)—and reads it to "specifically strip[] jurisdiction from the district courts" to consider dispositive statutory questions because an agency has previously weighed in on those questions. Pet. App. 8a. The court of appeals thus treated the Hobbs Act as though it gives agencies, rather than courts, the final word as to what federal law means.

The Fourth Circuit was wrong to ascribe such revolutionary meaning to a statute as ordinary as the Hobbs Act. That statute is one of many that establish what the Administrative Procedure Act ("APA") calls "special statutory review proceeding[s]." 5 U.S.C. § 703. There is variety across these provisions, but in broad strokes they serve to route judicial actions seeking equitable or declaratory relief from unlawful agency action to specified courts. They do not go the further step, however, of prohibiting all other courts from considering whether to apply an agency's interpretation of a statute in cases that do not seek relief against the government and that are properly before those courts.

Correctly construed, the Hobbs Act has a limited and sensible reach. Where applicable, it gives the courts of appeals exclusive jurisdiction over just one kind of proceeding: suits against the United States brought to obtain injunctive or declaratory relief from agency action. No other kind of proceeding is mentioned in the Hobbs Act. There is thus no reason to read the Act to give the courts of appeals a monopoly over all judicial

review of agency orders, even where no relief is sought against any federal agency, officer, or employee.

Moreover, a host of considerations strongly counsel against the Fourth Circuit's radical reading. Under that reading, the Hobbs Act would conflict with the presumption in favor of the reviewability of agency action, with a key provision of the APA embodying that presumption, *see* 5 U.S.C. § 703, and with constitutional avoidance principles, given the grave due process and separation of powers questions raised by the Fourth Circuit's construction. The better course, by far, is to treat the Hobbs Act as the conventional agency review statute that it is, and thus to hold that the Act merely confers original jurisdiction over certain equitable or declaratory actions against the government on the courts of appeals. It says nothing about other actions, like this one, properly brought in district court, and therefore does not interfere with the district court's authority, pursuant to its own "original jurisdiction [over] all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C § 1331, to decide the legal questions at the core of those actions.

A. Statutory And Regulatory Background

1. The Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991 ("TCPA") prohibits the use of "any telephone facsimile machine" to "send an unsolicited advertisement" to another "telephone facsimile machine." Pub. L. No. 102-243, sec. 3(a), § 227(b)(1)(C), 105 Stat. 2394, 2396 (codified as amended at 47 U.S.C. § 227(b)(1)(C)). The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is

transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). The TCPA creates a private right of action for "violation[s] of [the TCPA] or the regulations prescribed [thereunder]." *Id.* § 227(b)(3). In these private enforcement suits, each individual TCPA infraction may be punished by a $500 per violation penalty, which may be trebled if the violation was made "willfully or knowingly." *Id.* As many courts have observed, this statutory damages provision has made the TCPA a magnet for litigation. Many businesses that "have never heard of this obscure statute" face "very heavy penalties" for violations. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 916 (7th Cir. 2011); *see also Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) ("We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy ...."); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Commissioner Pai, dissenting) ("[T]he TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014."), *vacated in part, ACA Int'l v. FCC*, 885 F.3d 687, 693 (D.C. Cir. 2018).

The TCPA directs the Federal Communications Commission ("FCC" or "Commission") to "prescribe regulations to implement the requirements" of the statute. 47 U.S.C. § 227(b)(2). In 2006, pursuant to this responsibility, the Commission issued the order at the center of this case. For the most part, the order amended certain rules in light of changes to the TCPA made by the Junk Fax Prevention Act of 2005. *See* Pub.

L. No. 109-21, 119 Stat. 359 (codified as amended at 47 U.S.C. § 227). Those amendments are not relevant here. What is relevant is that in issuing the order, the Commission also "t[ook] the opportunity to address certain issues raised in petitions for reconsideration" of a 2003 FCC order concerning the TCPA's facsimile advertising rules. *See Report and Order and Third Order on Reconsideration: Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3788 (2006) ("2006 Order").[1] Those issues included the proper application of the TCPA's definition of "unsolicited advertisement" to "offers for free goods and services and informational messages."

With respect to that subject, the 2006 Order states that unsolicited "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *Id.* at 3814. The order observes that, "[i]n many instances, 'free' seminars serve as a pretext to advertise commercial products and services," and "free" publications likewise "are often part of an overall marketing campaign to sell property, goods, or services." *Id.*

At the same time, the 2006 Order states that "facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules," and that "[a]n incidental adver-

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[1] A "summary" of the 2006 Order was subsequently published in the Federal Register. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006). The Fourth Circuit referred to that summary as the "2006 FCC Rule." Pet. App. 5a.

tisement contained in such a newsletter does not convert the entire communication into an advertisement." *Id.* The order then sets forth a number of factors the Commission "will consider" in determining whether an advertisement is incidental to an "informational communication." *Id.* at 3814 n.187. Importantly, the order provides that the Commission "will review such newsletters on a *case-by-case* basis" to determine if their "primary purpose is informational, rather than to promote commercial products." *Id.* at 3814–15 (emphasis added).

2. The Hobbs Act

The Administrative Orders Review Act, better known as the Hobbs Act, establishes a mechanism for direct judicial review of certain final orders from several agencies, including the FCC. Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351); *see generally* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3941 (3d ed. 1998) (noting that the Hobbs Act is part of "a startling array of specific statutory provisions" that "establish court of appeals jurisdiction to review actions of agencies").

The Act outlines how a proceeding for direct review must be brought and conducted, and specifies what relief may be granted to a prevailing party. To obtain direct review, a "party aggrieved" by an order must petition within 60 days of the order's entry. 28 U.S.C. § 2344. "The action shall be against the United States," *id.*, and must be brought in the "judicial circuit in which the petitioner resides or has its principal office," or in the D.C. Circuit, *id.* § 2343. The record generally comprises any "proceedings before the agency," *id.* § 2347(a), and the court of appeals "has exclusive jurisdiction to make and enter . . . a judg-

ment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency," *id.* § 2349(a).

Section 2342 of the Act explains which agency actions are subject to direct review. As to the FCC, it provides that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47."[2] *Id.* § 2342. Section 402(a), in turn, provides that, with certain exceptions not relevant here, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission ... shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28," *i.e.*, the Hobbs Act. 47 U.S.C. § 402(a).

B. Factual Background And Proceedings Below

PDR is the publisher of the *Physicians' Desk Reference*, the nation's leading compendium of prescribing information for prescription drugs. Pet. App. 3a. As the Food and Drug Administration has observed, the *Physician's Desk Reference* compiles and reprints the "drug labeling, or package insert, that accompanies drug products," which the FDA regards as "the most complete single source of information on the drug."[3] The

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[2] The Hobbs Act also applies to certain actions of the Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission, and Secretary of Housing and Urban Development, and to all final orders issued by the Surface Transportation Board. *See* 28 U.S.C. § 2342(2)–(7); 42 U.S.C. § 5841(f) (transferring regulatory authority from Atomic Energy Commission to Nuclear Regulatory Commission).

[3] *See Frequently Asked Questions About Drugs*, U.S. Food & Drug Admin., https://www.fda.gov/aboutfda/centersoffices/office

Physicians' Desk Reference has been aptly described as "a publication generally available to all doctors and utilized by drug companies to inform the medical profession of the characteristics, uses and side effects of drugs." *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 921 (8th Cir. 1970); *see also, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 478 (2013) (citing *Physicians' Desk Reference* as a source describing a rare but serious side effect of nonsteroidal anti-inflammatory pain relievers); *Nelson v. Sandoz Pharm. Corp.*, 288 F.3d 954, 959 (7th Cir. 2002) (*Physicians' Desk Reference* "provides information concerning the uses and side effects of numerous prescription drugs"). Publication of this information in the *Physicians' Desk Reference* helps ensure that healthcare professionals are adequately warned of possible side effects and can make informed prescribing decisions for their patients. *See, e.g.*, *Guevara v. Dorsey Labs.*, 845 F.2d 364, 366 (1st Cir. 1988) (noting that inclusion of warning in *Physicians' Desk Reference* meant that defendant "unquestionably did warn of [a particular] hazard"); *Hall v. Merck, Sharp & Dohme*, 774 F. Supp. 604, 606 (D. Kan. 1991) (holding that information in *Physicians' Desk Reference* was sufficient to warn physician of side effects for purposes of learned intermediary doctrine); *see also United States v. Azmat*, 805 F.3d 1018, 1042 (11th Cir. 2015) (affirming denial of *Daubert* motion where challenged medical expert based his opinions regarding "the prescribing practices of other physicians" on the *Physicians' Desk Reference*).

PDR distributes the *Physicians' Desk Reference* to doctors and other healthcare professionals without charge. Pet. App. 35a. It sells neither the book nor any pharmaceutical products listed therein. Pet. App. 35a.

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ofmedicalproductsandtobacco/cder/ucm082690.htm (last updated Nov. 27, 2015).

PDR's revenue comes from fees pharmaceutical companies pay to include their drug labels in the compendium. Pet. App. 3a.

In 2013, PDR launched a digital "eBook" version of the *Physicians' Desk Reference*. To announce the eBook's availability, PDR sent a fax to healthcare professionals. One of the parties to receive the fax was respondent Carlton & Harris Chiropractic, Inc., a West Virginia healthcare practice. Pet. App. 3a. The one-page fax was addressed to the recipient's "Practice Manager," and the subject line read "FREE 2014 *Physicians' Desk Reference* eBook – Reserve Now." Pet. App. 3a. The fax invited the recipient to visit PDR's website and reserve an eBook copy of the coming year's edition of the *Physicians' Desk Reference*. Pet. App. 3a. The fax noted that the eBook contained the "[s]ame trusted, FDA-approved full prescribing information" as the physical version, but in a "convenient digital format." Pet. App. 3a–4a (alteration in original). At the bottom, the fax stated, "You are receiving this fax because you are a member of the PDR Network," and provided instructions on how the recipient could "opt-out of delivery." Pet. App. 51a (reproduction of fax); *see* Pet. App. 4a.

In November 2014, Carlton & Harris filed a putative class action, claiming that PDR's fax was an "unsolicited advertisement" sent in violation of the TCPA. Pet. App. 4a; Pet. App. 33a. PDR moved to dismiss, arguing that its December 2013 fax was not an "unsolicited advertisement" under the TCPA. Pet. App. 36a. PDR further contended that the FCC's interpretation of "unsolicited advertisement" in the 2006 Order was consistent with PDR's understanding of the statute. Pet. App. 39a.

The district court agreed with PDR and dismissed the case. Examining principally the text of the TCPA,

the court explained that the TCPA defines "unsolicited advertisement" as "'any material advertising the commercial availability or quality of any property, goods, or services,'" Pet. App. 36a–37a (quoting 47 U.S.C. § 227(b)(1)(C), (a)(5)), and that PDR's fax did not fit this definition because the *Physicians' Desk Reference* is not "bought or sold," and thus is not "commercially available," Pet. App. 36a–37a (internal quotation marks omitted). The district court also noted that PDR's fax did not have a "commercial aim" because it only "offers, for free, a reference book" that PDR does not sell, containing "information about prescription drugs" that PDR also does not sell. Pet. App. 38a. Thus, the court held, the "essential commercial element of an advertisement [wa]s missing from the fax." Pet. App. 38a.

The district court then addressed Carlton & Harris's argument that the Commission's 2006 Order conclusively resolved the dispute in its favor. First, the district court held that the Hobbs Act did not require it to adopt the 2006 Order because neither party had "challenged the validity" of the 2006 Order, Pet. App. 39a—PDR, after all, argued that the 2006 Order, properly construed, *supported* its contention that its conduct complied with the TCPA, *see* Pet. App. 24a; *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss at 10–12, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-cv-14887 (S.D. W. Va. Feb. 5, 2016), ECF No. 19. Second, the district court determined that the TCPA's definition of "unsolicited advertisement" was "unambiguous," and that the court accordingly was bound to apply that definition. Pet. App. 39a–40a. Finally, the court held that the interpretation set forth in the 2006 Order did not support Carlton & Harris's claim, but instead was "harmon[ious]" with the unambiguous meaning of the

TCPA. Pet. App. 41a. As the court explained, the 2006 Order, "careful[ly] read[]," encompasses only offers of a "commercial nature," Pet. App. 40a, such as offers for free goods or services that are "'part of an overall marketing campaign to sell property, goods, or services'" or are a "pretext for a commercial transaction that will inevitably follow the fax," Pet. App. 41a (quoting 21 FCC Rcd. at 3814). The court recognized that reading "the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspects ... strips essential meaning from the TCPA." Pet. App. 42a–43a. Because PDR's fax had no such commercial aspects, the district court held that it was not an "unsolicited advertisement" under the 2006 Order, properly construed. Pet. App. 42a.

In a divided decision, the Fourth Circuit reversed. It first held that the district court erred by relying on the text of the TCPA to determine whether PDR's fax was an "unsolicited advertisement." According to the Fourth Circuit, the Hobbs Act "precluded the district court" from taking this step—and likewise barred PDR from raising any defense based on the language of the statute—by conferring on the courts of appeal "'exclusive jurisdiction' to 'enjoin, set aside, suspend (in whole or in part), or to determine the validity of' the orders to which it applies." Pet. App. 7a (quoting 28 U.S.C. § 2342(1)). The Fourth Circuit read this language to "strip[]" the district court of "jurisdiction" to consider whether the interpretation of the TCPA offered by the FCC in the 2006 Order was valid, and instead to require the district court to "adopt the 2006 FCC Rule." Pet. App. 8a. The Fourth Circuit held that it made no difference that the "district court did not specifically invalidate the 2006 FCC Rule." Pet. App. 10a.

Turning to the proper interpretation of the 2006 Order, the Fourth Circuit then rejected the district court's view—as informed by the TCPA's text, Pet. App. 42a—that the order requires a fax to have a "commercial aim" to qualify as an "unsolicited advertisement." Pet. App. 13a. Instead, the Fourth Circuit held that the "plain meaning" of the 2006 Order is that *all* faxes that "promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." Pet App. 13a–14a (internal quotation marks omitted). According to the Fourth Circuit, once that plain meaning was ascertained, a court's "interpretive task [was] complete," and there was "no need" to "'harmonize' the FCC's rule with the underlying statute, or probe the agency's rationale." Pet. App. 14a. The Fourth Circuit recognized that the categorical rule it divined from the 2006 Order is "broad" and "prophylactic," and could reach "offers for truly free goods and services unconnected to any commercial interest." Pet. App. 15a, 17a. But it concluded that the reading was nonetheless a "reasonable one" because a "per se rule" prohibiting "all unsolicited offers for free goods or services" "advances the purpose of the underlying statute." Pet. App. 15–16a. The court did not explain why it thought it appropriate to consult the TCPA's "purpose," but not its text.

Judge Thacker dissented. She agreed with PDR that, read as a whole, the 2006 Order interprets the TCPA to mean that "a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA." Pet. App. 29a. Judge Thacker concluded that Carlton & Harris's complaint failed to plausibly allege such an aim. Pet. App. 30a–31a.

PDR timely petitioned this Court for review, and the Court granted the petition limited to the question of

whether the Hobbs Act required the district court in this case to accept the FCC's interpretation of the TCPA.

SUMMARY OF ARGUMENT

In the proceedings below, the district court held that the TCPA does not prohibit PDR's fax and that reading the FCC's 2006 Order to do so would violate the TCPA's terms. The Fourth Circuit reversed, not because it construed the TCPA differently—it expressly declined to consider the statute's language—but because it construed the Hobbs Act to require the district court to enforce the FCC's interpretation of the TCPA, regardless of whether that interpretation is consistent with the text of the statute. That decision is wrong for several independent reasons.

I.A. The Fourth Circuit misconstrued the Hobbs Act, giving the Act a much broader preclusive sweep than its text warrants. Properly read, the Hobbs Act vests courts of appeals with exclusive jurisdiction only over proceedings for *direct* review, in which a party seeks injunctive or declaratory relief against the United States from an allegedly unlawful agency action. The Hobbs Act thus does not affect the authority of district courts to fully adjudicate cases in which the United States is not a party and no injunctive or declaratory relief against it is sought.

The text and structure of the Hobbs Act make its limited jurisdictional scope clear. Section 2342 provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final orders covered by the Act. 28 U.S.C. § 2342. The terms "enjoin," "set aside," and "suspend" all refer to a specific type of relief—injunctive. The *noscitur a sociis* canon thus

counsels that the neighboring term, "determine the validity of," likewise refers to a specific type of relief—declaratory. Section 2349 confirms this understanding. It defines the courts of appeals' "exclusive jurisdiction" as embracing the power to issue "a *judgment* determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency," *id.* § 2349(a) (emphasis added). The statute thus reserves certain kinds of "proceedings" and "judgment[s]" to the courts of appeals.

The rest of the Act likewise outlines the procedures for obtaining such relief. The Act specifies that the proceeding "shall be against the United States," *id.* § 2344, limits the period for review to 60 days after an order's entry, *id.*, and restricts statutory standing to parties who participated in the agency proceedings, *id.* §§ 2344, 2348. The Hobbs Act thus gives the courts of appeals "exclusive jurisdiction" limited to a specific type of action for a specific type of relief (declaratory or injunctive) against a specific party (the United States). But it does not give the courts of appeals jurisdiction over the whole or part of any other kind of suit. And in particular, it says nothing about the district courts' consideration of cases properly before them. Nothing in the Hobbs Act, therefore, suggests any limitation on the power of district courts to fully consider a party's defenses to private civil damages claims.

I.B. The Administrative Procedure Act confirms the Fourth Circuit's error. It provides that, generally speaking, "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Because Carlton & Harris sought to enforce the FCC's interpretation of the TCPA, as reflected in the 2006 Order (or, more precisely stated, sought to enforce Carlton & Harris's interpretation of

the FCC's interpretation), the APA entitles PDR to judicial scrutiny of that "agency action" within the private enforcement proceeding authorized by the TCPA.

Section 703, to be sure, provides that judicial review within an enforcement proceeding is not required when "prior, adequate, and exclusive opportunity for judicial review is provided by law." *Id.* But, for at least five reasons, the Hobbs Act did not give PDR such an opportunity.

(1) PDR lacked statutory standing under the Hobbs Act. Hobbs Act review is available only to a "party aggrieved" by an order. 28 U.S.C. § 2344. The courts of appeals have unanimously read this language "to require as a general matter that petitioners be parties to any proceedings before the agency preliminary to issuance of its order." *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983) (citing cases). Because PDR did not participate in the FCC proceedings that gave rise to the 2006 Order, it could not have petitioned under the Hobbs Act.

(2) PDR was out of time to petition for review under the Hobbs Act. Hobbs Act review is available only within 60 days of the agency's issuance of a covered order. 28 U.S.C. § 2344. The courts of appeals have unanimously read that limitations period as jurisdictional. The window for anyone to seek Hobbs Act review of the 2006 Order thus closed in mid-2006—seven years before PDR sent its fax and nearly a decade before Carlton & Harris filed the complaint that initiated this suit.

(3) PDR had no practical reason to seek review of the 2006 Order during the allotted 60 days. Recall that PDR argued (and continues to believe) that the FCC's interpretation, properly understood, is consistent with

the TCPA. The need for review arose only when Carlton & Harris advanced an expansive reading of the FCC's position that numerous courts had rejected. If "prior, adequate" judicial review is provided by giving a party just 60 days to identify and protest all potentially adverse constructions of an agency interpretation that may hypothetically arise years later in litigation, the term "adequate" has lost all meaning.

(4) Such a construction would also empty the relevant language of section 703 of all practical effect, at least as concerns orders that announce agency interpretations of general applicability. A generally applicable interpretation, by its nature, applies to all manner of parties who are not "aggrieved" and therefore cannot obtain Hobbs Act review. Section 703 thus provides, appropriately, that judicial review ordinarily will be available when the rule is enforced against a particular party, except when "prior, adequate, and exclusive" review was available. To read Hobbs Act review as satisfying this requirement would be to allow the exception to swallow the rule.

(5) That reading would be particularly unwarranted because Congress knows how to expressly say it wants direct review to be the only avenue for challenging agency action in court. The Clean Water Act, for example, provides for direct review of Environmental Protection Agency actions in the courts of appeals, and separately specifies that orders that could have been challenged via direct review are generally not subject to judicial review in civil or criminal enforcement proceedings. Such statutes, however, are the exception that proves the rule. General direct review statutes such as the Hobbs Act do not implicitly preclude the judicial review in enforcement actions that section 703 expressly preserves.

I.C. Two additional interpretive canons counsel against the Fourth Circuit's interpretation of the Hobbs Act. First, that interpretation violates the presumption of reviewability of agency action. As noted, Hobbs Act review will often be unavailable to parties affected by a generally applicable rule announced by an agency. And the *ersatz* review pathways suggested by some courts that have adopted the Fourth Circuit's interpretation—petitioning the agency, and then appealing the agency's ruling under the Hobbs Act—are cumbersome at best and almost always illusory. The only certain route to judicial review is to allow defendants to raise their legal defenses in enforcement proceedings, before the court tasked with determining liability and measuring any accompanying damages.

I.D. Second, if accepted, the Fourth Circuit's interpretation of the Hobbs Act would raise grave constitutional concerns. Under that interpretation, PDR would be barred from litigating a statutory defense that it never had a full and fair opportunity to present to any court, on the theory that an agency has put the issue to rest without any judicial determination whatsoever. The Fourth Circuit's interpretation thus announces a new species of issue preclusion that attaches without due process. And by requiring the district court to determine PDR's liability for violating the TCPA based on an agency's effectively unreviewable interpretation of what the TCPA means, the Fourth Circuit's interpretation raises deep and troubling separation of powers questions. This Court can and should avoid these constitutional issues by adopting a conventional construction of the Hobbs Act.

II. Alternatively, the Hobbs Act did not require the district court in this case to accept the FCC's interpretation of the TCPA because the agency's discussion in

the 2006 Order of offers for free goods and services represents a mere interpretive rule. Under general principles of administrative law, interpretive rules do not bind courts or private parties, and frequently are not even reviewable by a court until applied by an agency to a particular party.

The Hobbs Act reflects this principle: to qualify as an FCC "order" reviewable under the Act, a rule must have the force of law, which interpretive rules do not. The Fourth Circuit overlooked this key distinction by assuming, without analysis, that the 2006 Order in its entirety was a binding legislative rule. But the Commission's discussion of "offers for free goods or services and informational messages" bears all the hallmarks of an interpretive rule. The district court therefore was not bound, by the Hobbs Act or otherwise, to slavishly follow it, and was instead free to interpret the TCPA using appropriate tools of statutory construction. The district court did exactly that, and correctly concluded that Carlton & Harris's complaint fails to plausibly allege that PDR violated the TCPA. That determination should be upheld.

ARGUMENT

I. THE HOBBS ACT DOES NOT PRECLUDE A DISTRICT COURT FROM DECIDING LEGAL QUESTIONS IN TCPA ENFORCEMENT SUITS BETWEEN PRIVATE PARTIES.

A. The Hobbs Act Solely Addresses Suits Against The Government Seeking Equitable Or Declaratory Relief From Unlawful Agency Action.

The Fourth Circuit's cursory statutory analysis focused almost exclusively on a single phrase of the Hobbs Act: the language in § 2342 giving the courts of

appeals "'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of'" certain agency orders. Pet. App. 7a (quoting 28 U.S.C. § 2342). Without explaining the textual basis for its conclusion, the Fourth Circuit read this language as "specifically stripp[ing] jurisdiction from the district courts" to review "FCC interpretations of the TCPA." Pet. App. 7a, 8a. The Fourth Circuit then went on to say, remarkably, that it was *improper* for the district court to attempt to "harmonize" the agency's interpretation of the TCPA with the statutory text itself because, when "the plain meaning of the regulation is clear, our interpretive task is complete." Pet. App. 13a–14a; *contra Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 95 (1995) (upholding agency's "reading of [Medicare] regulations" because it was "consistent with the Medicare statute"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (rejecting SEC's reading of Rule 10b-5 because it departed from "the language and history of s[ection] 10(b) [of the Exchange Act] and related sections of [other] Acts").

The Fourth Circuit's radical reading of the Hobbs Act finds no support in its text. The Act, rather, speaks *only* to jurisdiction over a specific type of proceeding: one for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government.

The limited scope of the Hobbs Act is evident in § 2342 itself. That provision gives the courts of appeals "exclusive jurisdiction" attached to a particular set of remedies. What is made "exclusive" to the courts of appeals is the "jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency actions, including, as relevant here, "all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." The

Fourth Circuit thus erred in reading the Hobbs Act to speak to jurisdiction over "certain *issue[s]*." Pet. App. 8a (emphasis added). The statute is much narrower than that. Rather than encompass *all* judicial review of particular issues, such as "FCC interpretations of the TCPA," Pet. App. 7a, § 2342 defines the courts of appeals' "exclusive jurisdiction" in terms of specific types of *relief* that a court of appeals alone may grant. Only a court of appeals may enjoin an agency order covered by the Hobbs Act. And only a court of appeals may vacate the order, stay it, or enter declaratory relief against it. That is all § 2342 says about the exclusive scope of court of appeals review, and that is therefore all that the Hobbs Act precludes a district court from doing.

Some of the courts that have reached the same basic conclusion as the Fourth Circuit have sought to justify a broader preclusive sweep by relying in isolation on the phrase "determine the validity of" in § 2342. They have reasoned that a court decides the "validity" of an agency interpretation anytime it considers whether the agency's interpretation is consistent with the governing statute. *E.g.*, *Nack v. Walburg*, 715 F.3d 680, 685–86 (8th Cir. 2013); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445 (7th Cir. 2010). This interpretation, however, fails to consider the statutory context in which the phrase "determine the validity of" sits.

In particular, it ignores the "commonsense canon of *noscitur a sociis*," which "counsels that a [term] is given more precise content by the neighboring words with which it is associated," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634–35 (2012), and which "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress," *McDonnell v. United*

States, 136 S. Ct. 2355, 2368 (2016). Here, the terms that surround the phrase "determine the validity of"—enjoin, vacate, and set aside—all plainly refer to forms of relief. *See* Black's Law Dictionary (10th ed. 2014) (defining "set aside" as "to annul or vacate (a judgment, order, etc.)"). The canon thus counsels that "determine the validity of" refers simply to another form of relief—declaratory relief.

Indeed, this Court has repeatedly used the phrase "determine the validity" in precisely this sense. For example, this Court explained that the Declaratory Judgment Act, 28 U.S.C. § 2201, permits "an insurance company [to] bring a declaratory judgment action to determine the validity of insurance policies." *Calderon v. Ashmus*, 523 U.S. 740, 746 (1998). Likewise, just five years before the Hobbs Act's enactment, in *Railway Mail Ass'n v. Corsi*, the Court noted that the appellant had initiated the litigation by "fil[ing] suit" against a state agency "in a state court for *a declaratory judgment to determine the validity* of [a state statute], and related provisions, and for an injunction restraining its enforcement." 326 U.S. 88, 91 (1945) (emphasis added). The courts of appeals of that era used similar language to connote declaratory relief. *See, e.g.*, *Gray v. N.M. Military Inst.*, 249 F.2d 28, 30–31 (10th Cir. 1957) ("The declaratory judgment remedy may not be invoked merely to try issues or determine the validity of defenses in pending cases.").

Thus, in context, the natural reading of § 2342's "exclusive jurisdiction" phrase is that it concerns "exclusive jurisdiction" over a grant of injunctive or declaratory relief against the government. Therefore, when no such relief is sought—as in a private TCPA class action suit for monetary damages—the Hobbs Act has no bearing on the power of the district court to decide the case.

A holistic look at the Hobbs Act's text and structure confirms this reading. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and "cannot be construed in a vacuum." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). The Fourth Circuit, however, focused narrowly on the "exclusive jurisdiction" phrase in § 2342, and failed to ask what clues about its meaning should be drawn from neighboring provisions.

Perhaps the single most telling clue comes from § 2349, entitled "Jurisdiction of the proceeding." Section 2349(a), which parallels § 2342, expressly defines the court of appeals' "exclusive jurisdiction" with reference to the specific types of relief the court may award. It provides that the court of appeals has "exclusive jurisdiction to make and enter . . . a *judgment* determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a) (emphasis added). This provision resolves any doubts about the meaning of the phrase "determine the validity of." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."). In tying the "determine the validity" phrase to a "judgment," § 2349 makes clear that the phrase refers to a remedy that the courts of appeals may enter as part of the judgment.

Other provisions of the Hobbs Act point in the same direction by defining the rules and procedures for actions to obtain such judgments. The Act defines *where* such actions may be brought, 28 U.S.C. § 2343 ("in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit"); *how*, *id.* § 2344 (by "fil[ing] a petition to review" the final order); *when*, *id.* ("within 60 days" of entry of the final order); *by whom*, *id.* ("[a]ny party aggrieved by the final order"); and *against whom*, *id.* ("against the United States"). The Act as a whole thus spells out the metes and bounds of the particular specialized "proceedings" over which the courts of appeals' jurisdiction is "exclusive." And, just as importantly, it does not say a word about any other type of judicial action in any other court.

Further textual support appears in Section 402(a) of the Communications Act, which the Hobbs Act incorporates by reference. *See* 28 U.S.C. § 2342(1). Mirroring § 2342, section 402(a) provides that, with certain exceptions not applicable here, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28 [*i.e.*, the Hobbs Act]." 47 U.S.C. § 402(a). Like the Hobbs Act, Section 402(a) speaks only to proceedings "brought" to obtain non-monetary relief against the FCC; it does not address judicial proceedings of other kinds, brought against other parties in other courts.

The text of the Hobbs Act thus resolves the question presented in this case. The Act establishes and regulates "proceedings" in which a party aims to obtain equitable or declaratory relief against the government from allegedly unlawful agency action. A TCPA damages suit between two private parties plainly is not

such a "proceeding"—a point well illustrated by the district court's judgment in this case, which directs that Carlton & Harris's damages claim "be dismissed and stricken from the docket of [the district] [c]ourt." Pet. App. 44a. That judgment—which no court of appeals could grant in a Hobbs Act proceeding—does not affect the rights or duties of the FCC or any other part of the government. It simply says that the plaintiff shall take nothing from the defendant. Nothing in the Hobbs Act precludes a defendant in a private damages case from making the legal arguments necessary to win that relief from a district court with jurisdiction over the case under § 1331. The Fourth Circuit erred in concluding otherwise.

B. The Administrative Procedure Act Confirms That A Defendant Generally May Challenge Agency Action In A Judicial Enforcement Proceeding.

The APA, which was enacted a few years before the Hobbs Act, but long after Congress began to provide regularized judicial supervision over agency actions through "special statutory review proceeding[s]," 5 U.S.C. § 703, also compels reversal of the decision below. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (recognizing that the APA "codifies the nature and attributes of judicial review" under the Hobbs Act).

Section 703 of the APA speaks directly to the question presented here. It first addresses how parties can obtain direct review of agency action, providing that they generally must avail themselves of any "special statutory review proceeding," such as that created by the Hobbs Act, but can proceed under the APA itself where no such proceeding is available. 5 U.S.C. § 703. It then provides that, notwithstanding these pathways to direct review, "agency action is subject to judicial

review in civil or criminal proceedings for judicial enforcement," "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law." *Id.* Thus, section 703 confirms that agency action *is* reviewable in judicial enforcement proceedings, except where another statute provides an opportunity for judicial review that is (1) prior, (2) adequate, *and* (3) exclusive. Because PDR had no such opportunity, section 703 confirms that PDR is entitled to judicial review of the 2006 Order in this TCPA enforcement proceeding.

1. The Hobbs Act did not give PDR any prior or adequate opportunity for review of the 2006 Order because it denied PDR standing to seek such review. As noted, § 2344 states that Hobbs Act review is available only to a "party aggrieved" by agency action, and the long established construction is that this phrase extends statutory standing under the Hobbs Act only to those parties who participated in the agency proceeding; no others may petition for review under the Act. *Simmons*, 716 F.2d at 42 (citing cases). PDR did not participate in the proceedings that gave rise to the 2006 Order, and thus could not have petitioned under the Hobbs Act.

2. If PDR had attempted to seek Hobbs Act review after Carlton & Harris sued, it would have encountered a second problem—its petition would have been hopelessly out of time. Section 2344 permits suit only within 60 days after the agency issues a covered order, and every court of appeals to consider the issue has held that the time limit is jurisdictional and "may not be enlarged or altered by the courts." *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 & n.43 (D.C. Cir. 1981) (citing cases from the Second, Fifth, and Eighth Circuits); *see Council Tree Inv'rs, Inc. v. FCC*, 739 F.3d 544, 551 (10th Cir. 2014);

N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 414 (3d Cir. 1994); *Tenn. Pub. Serv. Comm'n v. ICC*, 921 F.2d 277 (6th Cir. 1990) (citing cases from Fifth and Ninth Circuits); *Ill. Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983); *P.A.K. Transp., Inc. v. United States*, 613 F.2d 351, 353 n.1 (1st Cir. 1980). The time in which to seek Hobbs Act review thus expired long before the current TCPA suit began.

3. PDR had no practical reason to seek review of the 2006 Order during the allotted 60 days because the interpretive issue at the heart of this suit was not joined until after the litigation began. Before then, readers of the 2006 Order had no basis to suspect the FCC had announced a "per se" rule barring faxed offers of free goods and services, as Carlton & Harris argued below.[4] That point is borne out by the fact that multiple courts have rejected the construction of the 2006 Order's language that the Fourth Circuit adopted below. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 96 & n.1 (2d Cir. 2017). Those courts have recognized that "*not every*" unsolicited fax promoting a free good or service satisfies the rule announced in the 2006 Order. *Id.* at 96 (emphasis added). Rather, for such a fax to fall under the 2006 Order, "[t]here must be a commercial nexus to a firm's business, *i.e.*, its property, products, or services." *Id.*; *see also Sandusky Wellness Ctr., LLC v. Medco Health Sols.*, 788 F.3d 218, 223–24 (6th Cir. 2015) ("To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim."). This "comports with the statutory language, which defines offending advertisements as those promoting 'the

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[4] Indeed, as demonstrated in Part II, *infra*, all indications were that the FCC had articulated a non-binding interpretation, rather than a binding legislative rule.

commercial availability or quality of [the firm's] property, goods, or services.'" *Physicians Healthsource*, 847 F.3d at 95 (alteration in original) (emphasis added) (quoting 47 U.S.C. § 227(a)(5)). Thus, to say that PDR should have sued in 2006 is essentially to contend that it should have anticipated Carlton & Harris's argument and initiated preemptive litigation against the FCC to protect itself against such hypothetical, overbroad constructions of the 2006 Order that conflict with the statute.

Even assuming that any court of appeals could or would have entertained such an abstract dispute, there is certainly no reason to view that kind of premature litigation as supplying an "adequate" opportunity for judicial review of the Commission's legal interpretation. And the courts of appeals have not embraced that approach. Instead, they recognize that with respect to generally applicable rules, the Hobbs Act's "time limit restricting judicial review of [agency] action is applicable only to cut off review directly from the order promulgating a rule," not from subsequent actions by an agency to enforce it. *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *see Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714–15 (9th Cir. 1991); *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985); *Tri-State Motor Transit Co. v. ICC*, 739 F.2d 1373, 1375 (8th Cir. 1984); *Ill. Cent. Gulf R.R.*, 720 F.2d at 961.

That approach makes perfect sense. Because "administrative rules and regulations are capable of continuing application[,] limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music*, 274 F.2d at 546.

That would include parties that first come into existence after the 60-day direct review window has closed, as well as parties for whom "the ultimate impact, or even the likelihood of enforcement, of proposed rules may be far from clear." *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

These concerns are particularly acute in the context of the TCPA, which regulates literally every business using auto-dialed or recorded calls, faxes, or text messages in the United States. *See* 47 U.S.C. § 227(b). In the context of a more highly regulated industry, this Court recognized the unreasonableness of expecting "innumerable small businesses" to protect themselves against agency overreach by staying abreast of rulemakings and bringing litigation against invalid rules. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 n.2 (1978). It is all the more unrealistic to expect businesses of every size in every field to protect themselves from unlawful TCPA regulations by scrutinizing the FCC docket and bringing pre-enforcement challenges under the Hobbs Act—especially given that the interval between the unlawful regulation and the fax at issue might be years, as it was here.

4. The only other way to read section 703 would be to say that the Hobbs Act's 60-day window in 2006 somehow counts, for PDR, as the "prior, adequate, and exclusive" review opportunity contemplated by the APA. But that cannot be right, or else the exception (no further review if the defendant already had a full, fair and final opportunity) would swallow the rule ("agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement") where agency rules of general applicability are concerned. Such rules, by their nature, apply to all manner of parties who are not "aggrieved" under the Hobbs Act and thus cannot personally obtain Hobbs Act review. *See*

Functional Music, 274 F.2d at 546. If the Act's 60-day window were the sole opportunity for all parties to challenge a generally applicable regulation for all time, the Hobbs Act would become a trap for the unwary, which never has been and cannot be the law.

This is not to say that the Hobbs Act *never* provides a "prior, adequate, and exclusive" opportunity for judicial review. When an agency issues an order settling the rights or duties of a specific party, that party is undoubtedly "aggrieved" within the meaning of § 2344 and can challenge the order under the Hobbs Act. In that circumstance, the distinction between direct and enforcement review frequently collapses, and the Hobbs Act furnishes a "prior, adequate, and exclusive" mechanism for challenging the order, both facially and as-applied. But this logic is limited to party-specific orders; for orders promulgating rules of general applicability, a party may not be "aggrieved" in any legal or practical sense until it faces a judicial enforcement action. In that circumstance, section 703 preserves the right to judicial review.

Two decisions of this Court illustrate the point. In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, a defendant in a suit for damages owed under a port agreement approved by the Federal Maritime Commission sought to assert as a defense that the agreement was invalid. *See* 400 U.S. 62, 64, 67 (1970). This Court held that the Hobbs Act precluded that challenge because the defendant, through an agent, had been party to a prior proceeding before the Federal Maritime Commission seeking review of the agreement, and, after the commission upheld the agreement, both the defendant and its agent had failed to seek timely judicial review. *See id.* at 69, 71–72. Thus, in every practical sense, the defendant had a "prior, adequate, and exclusive" opportunity for

review of the agency order. As the Court emphasized, although the defendant "was not named as a party [to the agency proceedings], it was in fact represented before the Commission," had "previously made numerous claims to party status," and had "interests [that] were clearly at stake." *Id.* at 71–72. Because the defendant had both every motive and "every opportunity to participate before the Commission and then seek timely review in the Court of Appeals," *id.* at 72, this Court refused to allow the defendant to challenge the order in a district court proceeding.

FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984), is to similar effect. There, ITT petitioned the FCC for rulemaking regarding what sorts of agreements the FCC could enter into when negotiating with foreign governments. *See id.* at 465–66. When the FCC denied the petition, ITT sought review in the D.C. Circuit and concurrently filed suit in district court to enjoin the FCC from engaging in negotiations in the manner ITT opposed. *See id.* at 466–67. This Court held that the Hobbs Act precluded ITT from asking the district court "to enjoin action that is the outcome of [an FCC] order" where, "[i]n substance, the complaint filed in the District Court raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied by the FCC." *Id.* at 468. Thus, like *Port of Boston*, *ITT* prohibited a collateral attack on an agency order by a party that had a full and fair opportunity for judicial review under the Hobbs Act—*i.e.*, the "prior, adequate, and exclusive" review envisioned by section 703.

Together, *Port of Boston* and *ITT* exemplify when it may be appropriate to say that direct review of an agency order qualifies as a "prior, adequate, and exclusive" opportunity for review. In those cases, the parties

who sought district court review had also been parties (or had been adequately represented) in an agency proceeding that directly settled their legal rights and obligations. In that kind of setting, it generally can be said that the party has had a full and fair opportunity for review, and should not be permitted to evade the "special statutory review proceeding" established by Congress. *See ITT*, 466 U.S. at 468.

The same cannot be said where, as here, the agency first acts by announcing a rule of general applicability, and the defendant only later—much later—becomes subject to an enforcement action. In that circumstance, as the *Functional Music* line of cases recognizes, it would be both unfair and impractical to treat the Hobbs Act as having preclusive effect—and would also flatly violate section 703's command.

5. The Fourth Circuit's holding is also at odds with how courts have long interpreted other statutes that commit direct review of agency orders to a court of appeals. Consistent with section 703, courts have not understood such statutes to preclude judicial review of regulations when they are enforced in district court. By casting doubt on that understanding, the Fourth Circuit's interpretation of the Hobbs Act would open the door to a range of unjust and absurd consequences.

Examples of comparable statutory schemes are found across the U.S. Code. For instance, orders promulgating occupational safety and health standards are directly reviewable in the courts of appeals, *see* 29 U.S.C. § 655(f), but enforceable through civil and criminal proceedings in district court, *see id.* §§ 662(a), 666(e). Under the Fourth Circuit's logic, the former provision would preclude review in enforcement actions brought under the latter ones. Yet when the Secretary of Labor (or Department of Justice, in criminal cases) has brought such enforcement actions, the

courts—including this one—have considered defendants' arguments that the orders at issue are substantively invalid. *See, e.g.*, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 4, 7–9 (1980) (in civil action to enjoin violation of a regulation promulgated under the Occupational Safety and Health Act, examining "whether this regulation is consistent with the Act"); *see also United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1346, 1354 (N.D. Ill. 1997) (in criminal prosecution for violation of occupational safety regulation, considering argument that regulation was procedurally invalid).

The same is true in the securities context. Under the Exchange Act, courts of appeals have "exclusive" jurisdiction to directly review final orders and certain regulations issued by the Securities and Exchange Commission, *see* 15 U.S.C. § 78y(a)(1), (3); *id.* § 78y(b)(1), (3), while the government may bring civil and criminal actions to enforce those orders and regulations in district court, *see id.* §§ 78ff(a), 78u(d), 78u-1(a)(1). Again, the Fourth Circuit's logic would suggest that the provisions for direct review preclude judicial review in the enforcement context. And, again, the practice has been precisely the opposite. In enforcement proceedings, this Court and others have routinely considered defendants' arguments that the SEC's interpretations of the law, as reflected in orders and regulations, are substantively invalid, or must be narrowed to cohere with the statute's text. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 666–76 (1997) (SEC did not exceed its statutory authority under § 14(e) of the Exchange Act in adopting Rule 14e–3(a)); *Ernst & Ernst*, 425 U.S. at 212–14 (rejecting SEC interpretation of Rule 10b-5 as inconsistent with text of the Exchange Act); *SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 795–96 (S.D.N.Y. 2018) (considering defendant's argument that Rule

17a–8 "is not a reasonable interpretation of the Exchange Act, and is therefore invalid").

In short, if applied to the many materially indistinguishable judicial review statutes currently in effect, the Fourth Circuit's interpretation of the Hobbs Act would curtail the defenses available to a large number of parties in a wide range of contexts—including many where defendants' fortunes, livelihoods, and even liberty are directly at stake. This outcome is frankly unimaginable.

Worse, by broadly precluding judicial review in enforcement settings, the Fourth Circuit's interpretation of the Hobbs Act (and, by extension, other commonplace judicial review provisions) would produce all manner of unfair and absurd results. For example, it would allow agencies to effectively insulate their interpretations from review by enforcing them in district court rather than in administrative proceedings subject to direct court of appeals review. It would also mean that if Congress decided to supersede an agency interpretation by enacting a new statute, the statute could not be given effect in an enforcement suit until the agency itself revised its preexisting regulations. That is so because, under the Fourth Circuit's rule, a district court would have no power to consider whether the agency's old interpretation was consistent with the new law. And if the agency announced that its interpretation of the new law was identical to its interpretation of the old one, a district court would likewise be powerless to protect defendants.

It is improbable, to say the least, that Congress intended to subordinate both its own powers and those of the courts to administrative agencies in these ways. And if Congress really did intend such consequences, at a minimum it would have to speak more explicitly than it did in the Hobbs Act.

6. Indeed, it bears emphasis that in the unusual circumstance where Congress has in fact intended to preclude judicial review of agency interpretations even in enforcement proceedings, it has expressed that intention in no uncertain terms. The Clean Water Act provides one example. Section 1369(b)(1) "enumerates seven categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018); *see* 33 U.S.C. § 1369(b)(1). Paragraph (b)(2) then states: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection *shall not be subject to judicial review in any civil or criminal proceeding for enforcement.*" 33 U.S.C. § 1369(b)(2) (emphasis added). Provisions of the Clean Air Act and of CERCLA—both of which commit direct review of covered orders exclusively to a court of appeals—are similar. *See* 42 U.S.C. § 7607(b)(2); *id.* § 9613(a).

That Congress felt the need in these statutes to specify that review is unavailable in "civil or criminal proceeding[s] for enforcement" is significant. Under the Fourth Circuit's view, the fact that these statutes contain direct review provisions that route "exclusive" jurisdiction to the courts of appeals would alone suffice to preclude district courts from reviewing orders in enforcement proceedings—in other words, the provisions expressly precluding such review would be unnecessary. This Court, however, is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). The better interpretation, which "give[s] effect ... to every clause and word" of the environmental statutes, is that the provisions constraining judicial review in enforcement proceedings *are* meaningful because the direct

review provisions, standing alone, say nothing about that issue. *Setser v. United States*, 566 U.S. 231, 239 (2012) (ellipsis in original). Section 703 of the APA confirms that interpretation by providing that even when direct review of agency orders lies exclusively in courts of appeals, the default rule is that district courts may review such orders in enforcement proceedings. Because the Hobbs Act leaves that default rule intact, the Fourth Circuit's view that it bars judicial review in a private enforcement action is wrong.

C. The Presumption Of Reviewability Of Agency Action Supports Construing The Hobbs Act Narrowly.

To the extent the Hobbs Act and APA leave any ambiguity, the "strong presumption that Congress intends judicial review of administrative action" counsels against construing the Act to preclude a defendant from obtaining review of the FCC's interpretation of the TCPA in an enforcement action. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Without that ability, many defendants will have no opportunity for judicial review of the orders being enforced against them because, in most cases, the 60-day window for direct review under the Hobbs Act will have long since closed.

To address this problem, some courts that have read the Hobbs Act as the Fourth Circuit did here have suggested that TCPA defendants may pursue judicial review by (1) filing a petition for reconsideration or rulemaking with the FCC and then (2) appealing any adverse decision by the FCC to a court of appeals. *See, e.g.*, *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir. 2013); *Nack*, 715 F.3d at 682. This suggestion, however, ignores that section 703 preserves the right to review in enforcement actions unless another route is "prior, adequate *and* exclusive,"

and that the option of filing a petition with the agency *after* a suit commences is none of the above. Neither the petitions nor the eventual court of appeals proceeding would be *prior* to the enforcement suit. Moreover, the court of appeals proceeding would not actually review the "agency action" at issue in the TCPA suit; rather, it would review the distinct agency action resulting from the new petition. *Cf. Bhd. of Locomotive Eng'rs*, 482 U.S. at 278–80 (distinguishing a decision respecting a petition to reopen a proceeding from the decision in the underlying proceeding itself).

There are also serious practical problems with these alternatives that will prevent them, in most if not all instances, from providing pathways to judicial review of an underlying rule. For reconsideration and declaratory ruling petitions, the main problem is one of timing. A petition for reconsideration must be filed within 30 days of an order's promulgation. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.104(b). In almost every conceivable enforcement setting, that deadline will have long passed before a plaintiff's complaint alerts a defendant to the problem. Petitions for declaratory rulings are generally useless in this setting for a similar reason. The FCC has opined that "[t]o allow ... parties to challenge the validity of [a] rule via a request for declaratory ruling years after a rule has been promulgated would effectively circumvent the statutory channels for review of Commission rules." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 13998, 14006 (2014), *vacated sub nom. Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018). In other words, the FCC generally rejects the premise that a declaratory ruling may be used as a substitute for the direct review available under the Hobbs Act.

Petitions for new rulemakings pose a different but equally fundamental problem. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). No such language appears in the TCPA. Thus, any new rules would be prospective, and a new *prospective* rule will not do anything to protect a defendant from liability for *past* conduct. Relief can come only from an adjudication of what the law was at the time of the defendant's relevant acts. That adjudication is naturally provided by a court—the court that has jurisdiction over the claims lodged against the defendant.

Another practical problem is that petitions for rulemaking and declaratory orders frequently drag on for years. *See, e.g., Bais Yaakov*, 852 F.3d at 1081 (holding, in 2017, that the FCC lacked authority to issue TCPA regulation concerning solicited faxes and vacating a 2014 FCC order denying a petition for a declaratory ruling filed in 2010); *cf. In re Pesticide Action Network N. Am.*, 798 F.3d 809, 814 (9th Cir. 2015) (granting mandamus following eight-year delay in resolving petition); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (describing six-year delay in responding to judicial remand); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80–81 (D.C. Cir. 1984) (describing FCC delays of two, four, and five years in resolving petitions).

The district court presiding over the TCPA suit can, of course, grant a discretionary stay of the action while the defendant pursues matters with the agency. But courts in TCPA suits have denied requests for such stays, viewing the route to Hobbs Act review as long and the outcome, uncertain. *See, e.g., Edwards v.*

Oportun, Inc., 193 F. Supp. 3d 1096, 1101 (N.D. Cal. 2016) (denying stay pending issuance of D.C. Circuit decision on validity of TCPA regulation because there was "no certain way to determine when a ruling will be forthcoming"); *Lathrop v. Uber Techs., Inc.*, 2016 WL 97511, at *5 (N.D. Cal. Jan. 8, 2016) (similar); *Hofer v. Synchrony Bank*, 2015 WL2374696, at *2–3 (E.D. Mo. May 18, 2015) (similar).[5] For defendants in such cases, the Hobbs Act pathway will often be too slow to make any difference in the TCPA suit.

Further, even if a stay of the TCPA action were certain, the length and expense of litigating an entirely separate action through multiple levels of agency and judicial review would be prohibitive for many defendants. *Cf. Bridgeview Health*, 816 F.3d at 941 (noting that the TCPA has "become the means of targeting small businesses"). This problem is especially severe because TCPA suits, including this one, are commonly brought as class actions seeking uncapped statutory damages. Faced with the risks inherent in such actions, many defendants will settle early on, "rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing "the risk of 'in terrorem' settlements that class actions entail"); *ACA Int'l*, 885 F.3d

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[5] To be sure, some courts have granted stays in such circumstances. *See Flockhart v. Synchrony Bank*, 2017 WL 3276266, at *3 (N.D. Iowa Aug. 1, 2017) (granting stay, noting that "[f]ederal courts have split decisions in motions to stay TCPA violation cases" pending Hobbs Act review of underlying FCC rules, and citing cases). But the fact remains that in cases that are not stayed, defendants risk losing the opportunity for any meaningful judicial review.

at 693 (noting a "surge in TCPA lawsuits (including class actions) in recent years").

D. The Fourth Circuit's Interpretation Of The Hobbs Act Raises Grave Constitutional Concerns That Can And Should Be Avoided.

The canon of constitutional avoidance further supports PDR's narrower construction of the Hobbs Act. If, as PDR contends, the Hobbs Act simply routes claims against the government for injunctive and declaratory relief from certain agency actions to the courts of appeals rather than the district courts, then the Act does not raise any constitutional concerns—it is uncontroversial that Congress may distribute jurisdiction over such causes of action among Article III courts.

But if, as the Fourth Circuit held, the Hobbs Act's grant of "exclusive jurisdiction" over proceedings for injunctive and declaratory relief also operates, implicitly, to bar district courts from considering statutory defenses raised by defendants in damages suits between private parties, then the Hobbs Act poses at least two grave constitutional questions.

The first, based on fundamental notions of due process, concerns whether Congress may bind defendants to the results of agency proceedings that are not challenged within a 60-day period, or are challenged only by other parties. The second, arising under Article III, concerns whether Congress may require the courts, in deciding cases properly before them, to slavishly apply an agency's interpretation of a statute. Long established principles of constitutional avoidance counsel against adopting the construction "that raises serious constitutional doubts," and in favor of "adopt[ing] an

alternative" construction like PDR's, which is consistent with the statute's text and "avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

1. The Fourth Circuit's Interpretation Raises Grave Due Process Concerns.

Under the Fourth Circuit's interpretation, the Hobbs Act imposes what is in essence a severe form of issue preclusion, barring TCPA defendants from litigating issues in a TCPA suit that could have been decided in a proceeding for direct review under the Hobbs Act, even if they never actually were. This approach jettisons several limits on issue preclusion essential to respecting due process.

The traditional rule of issue preclusion is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27, at 250 (1980)). Critically, preclusion requires the estopped party to have had "a full and fair opportunity to litigate" the issue in the prior proceeding. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

These requirements are part of a "deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 892–93. They represent constitutional boundaries that neither courts nor Congress may transgress. As this Court has repeatedly recognized, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be

heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). Litigants "who never appeared in a prior action [] may not be collaterally estopped without litigating the issue." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *accord Richards v. Jefferson Cty.*, 517 U.S. 793, 797 n.4 (1996).

The Fourth Circuit's decision applied the Hobbs Act in precisely the manner these decisions prohibit. PDR was not a party to the agency proceedings that underlie the 2006 Order, let alone to a prior relevant litigation. Thus, the Fourth Circuit's conclusion that PDR is effectively estopped from raising any argument bearing on the consistency between the 2006 Order and the TCPA itself raises grave due process concerns.[6]

2. The Fourth Circuit's Interpretation Raises Severe Separation of Powers Concerns.

As interpreted by the Fourth Circuit, the Hobbs Act would also raise a serious question about whether

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[6] This Court has not considered the constitutionality of provisions in the Clean Air Act and other statutes expressly precluding judicial review of agency actions in enforcement proceedings. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980); *supra* at 37 (describing such provisions). Its decision in *Adamo Wrecking Co. v. United States*, however, recognized that the "severity" of such provisions warrants narrowly construing the range of actions to which they apply. 434 U.S. at 282–84 & n.2. Furthermore, Justice Powell, who provided the fifth vote in *Adamo Wrecking*, stressed in a concurring opinion in that case that the "constitutional validity" of such provisions "merited serious consideration." *Id.* at 289 (Powell, J. concurring); *see also Harrison*, 446 U.S. at 594 (Powell, J., concurring) ("I continue to have reservations about the constitutionality of the notice and review preclusion provisions of [the Clean Air Act]."). The D.C. Circuit has likewise recognized the "substantial due process question" such provisions pose. *Chrysler Corp. v. EPA*, 600 F.2d 904, 913 (D.C. Cir. 1979).

Congress has improperly intruded upon the defining attribute of Article III judicial power—the Judiciary's authority "'to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes").

According to the Fourth Circuit, the Hobbs Act "specifically stripped jurisdiction from the district court[]" to determine the meaning of the TCPA in this case. Pet. App. 8a. In truth, the Fourth Circuit's characterization of this supposed statutory command as "jurisdiction-stripping" is inapt. The district court clearly had subject-matter jurisdiction over the *suit*. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376 (2012) (federal and state courts have concurrent jurisdiction over private suits arising under the TCPA). But under the Fourth Circuit's view of the Hobbs Act, the district court nonetheless lacked authority to consider the dispositive legal question at the heart of that suit—the meaning of the statute that Carlton & Harris seeks to punish PDR for (supposedly) violating.

On that view, the Hobbs Act raises one of the deepest questions in the federal courts canon: the extent of Congress's power to strip Article III courts of the power to decide legal questions central to the "Cases or Controversies" pending before them.[7] Outside the

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[7] The question runs so deep in the canon that a variation upon it features in Professor Hart's famous dialectic: "Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think

context of a "war-time emergency measure," *Yakus v. United States*, 321 U.S. 414, 431 (1944), this Court has never directly addressed this question, but its decisions bearing on related questions concerning the intersection between the Legislative and Judicial powers, running back to at least *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), cast serious doubt on whether Congress may do so. In recently summing up those decisions in *Bank Markazi*, this Court treated it as beyond dispute that Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it," and quoted *Marbury v. Madison* for the proposition that "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." 136 S. Ct. at 1323 (quoting 5 U.S. (1 Cranch) at 177) (alterations in original). In *City of Arlington v. FCC*, this Court declared that while "Congress has the power (within limits) to tell the courts what classes of cases they may decide," it may not "prescribe or superintend how they decide those cases." 569 U.S. 290, 297 (2013). And in *Plaut v. Spendthrift Farm, Inc.*, this Court read the "record of history" to demonstrate that the Founders crafted Article III "with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them." 514 U.S. 211, 218–19 (1995). These statements cast profound doubt on whether the Hobbs Act is constitutionally valid if interpreted to prevent courts presiding over private damages disputes, such as cases arising under the TCPA, from considering what that statute means.

That the Hobbs Act, as construed by the Fourth Circuit, does not just remove from the Judiciary the power

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Marbury v. Madison." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378–79 (1953) (footnotes omitted).

to interpret the law, but takes the further step of vesting that power in a mix of Executive and independent agencies, only worsens the separation-of-powers problem. This Court has carefully reserved to Article III courts the right to review the legal conclusions reached by agencies. Most notably, in *Crowell v. Benson*, the Court turned aside an Article III objection to a statute that insulated an agency's findings of fact from judicial review, reasoning in part that this insulation was "deemed to relate only to determinations of fact," not of law. 285 U.S. 22, 49 (1932); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly."). *Crowell* has since been read for the proposition "that the judicial review afforded by the statute, including review of matters of law, 'provides for the appropriate exercise of the judicial function in this class of cases,'" *i.e.*, those "concern[ing] obligations among private parties." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (quoting *Crowell*, 285 U.S. at 293). By reading the Hobbs Act to strip away judicial review of a critical legal dispute between private litigants, the Fourth Circuit's decision does serious violence to foundational safeguards of the administrative state.

As explained above, there are plenty of reasons for the Court to reject the Fourth Circuit's interpretation, even before reaching constitutional avoidance. But there is certainly no reason for this Court to read this commonplace agency review statute in the sweeping manner the Fourth Circuit did when the more than plausible construction offered by PDR avoids these fundamental difficulties. *See Jennings*, 138 S. Ct. at

836; *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (grounding the avoidance canon in the "reasonable presumption" that when a statute has two plausible interpretations, "Congress did not intend the alternative which raises serious constitutional doubts").

II. ALTERNATIVELY, THE DISTRICT COURT WAS NOT REQUIRED TO ACCEPT THE FCC'S INTERPRETATION IN THIS CASE BECAUSE THE AGENCY STATEMENTS AT ISSUE ARE NOT BINDING ON THE COURTS OR ANY PRIVATE PARTY.

The Fourth Circuit's decision is also wrong for a reason entirely independent of its misconstruction of the Hobbs Act. The Fourth Circuit assumed, without analysis, that the FCC's discussion of offers for free goods and services in the 2006 Order was a legislative rule, which binds courts and private parties, rather than an interpretive rule, which does not. That discussion in the 2006 Order, however, bears all the hallmarks of an interpretive rule. Therefore, under both general principles of administrative law and the text of the Hobbs Act, the district court was neither bound by the FCC's interpretation nor required to defer to it. It was free to construe the TCPA for itself and determine that PDR had not violated the statute.

The distinction between legislative and interpretive rules is central to administrative law. A legislative rule has the "force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979), and thus binds courts, private parties, and the agency itself to its terms. *E.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). Interpretive rules, in contrast, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). Rather, their "critical feature" is that they are

issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* Put another way, "interpretive rules or policy statements will not [bind agency discretion or private party conduct], *regardless* of their validity." *Viet. Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

The Fourth Circuit did not expressly consider whether the discussion of offers for free goods and services in the 2006 Order is a legislative rule, but that is the only reading that makes sense of the Fourth Circuit's assertion that it would be nonsensical "[t]o hold that a district court cannot enjoin or set aside a rule but is nevertheless free to ignore it (or decline[] to defer to it)." Pet. App. 10a–11a (internal quotation marks and citation omitted). That reading likewise finds support in the Fourth Circuit's repeated references to the FCC's interpretation as a "regulation," the "plain meaning" of which controlled the rights and obligations of the parties. Pet. App. 13a–14a. The Fourth Circuit plainly assumed that the FCC's interpretation constitutes a "legislative rule."

That assumption was too simplistic because the distinction between interpretive and legislative rules is critical in this case. First, the Hobbs Act does not apply at all to interpretive rules. An FCC rule is an "order" reviewable under 47 U.S.C. § 402(a), and hence subject to the Hobbs Act's provisions, only if it has the "force of law" in the sense that it "sets a standard of conduct for all to whom its terms apply." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942). Interpretive rules do not have that effect.

Second, the distinction between interpretive and legislative rules goes directly to the Fourth Circuit's perception that there was something untoward about the

district court's refusal to automatically apply the interpretation set forth in the 2006 Order. In the Fourth Circuit's view, the Hobbs Act barred the district court from declining to treat that interpretation as establishing the rule of decision. But there is no such disconnect if the FCC's interpretation is properly regarded as an interpretive rule or general policy statement because "a court is not required to give effect to an interpretative regulation."[8] *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

The FCC's discussion of "offers for free goods and services and informational messages" bears all of the hallmarks of a non-binding interpretive rule or policy statement because it serves to clarify the agency's interpretation of the TCPA and expectations for its own enforcement practices. It does not impose new commands upon private parties or courts.

As noted, the "critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204. The Commission's discussion concerning "offers for free goods and services and informational messages" does

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[8] Of course, even if the district court were bound by the FCC's rule, PDR's position remains that the district court's interpretation of that rule was correct, in light of the text of the TCPA and the plain language of the 2006 Order itself. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Sandusky*, 788 F.3d at 223 (holding that the "unambiguous terms" of the TCPA apply only to faxes with "commercial components" (internal quotation marks omitted)); *cf. Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (holding that advocating for a "purposeful but permissible reading of the regulation to bring it into harmony with the statute" is not tantamount to "seek[ing] an implicit declaration that the ... regulations were invalid as written" (internal quotation marks and ellipses omitted)).

just that, and nothing more. It explains the Commission's general understanding that the TCPA regulates commercial fax messages while leaving "noncommercial speech" unregulated. 21 FCC Rcd. at 3810 n.156. It outlines the Commission's view that fax messages that "promote goods or services" qualify as "unsolicited advertisements," even if the commercial "promot[ion]" takes on nominally "no cost" features. *Id.* at 3814. It introduces the Commission's understanding that "informational messages" are an aspect of the "noncommercial speech" that the TCPA leaves unregulated. *Id.* at 3814 & n.156. And, critically, it lays out a non-exhaustive lists of factors the Commission expects to "consider" on a "case-by-case basis" in distinguishing between "informational messages," on the one hand, and "commercial" messages that "promote goods or services," on the other. *Id.* at 3814–15 & n.187. The FCC's interpretation thus advises the regulated community on how the Commission "will exercise its broad enforcement discretion ... under some extant statute or rule." *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)).

Furthermore, unlike a "legislative rule," nothing in the relevant paragraphs of the FCC's order purports to create new, binding obligations for private parties or to alter anything in a prior Commission regulation. *See United States v. Picciotto*, 875 F.2d 345, 347–48 (D.C. Cir. 1989) (explaining that interpretive rules "merely restate existing duties, rather than creat[e] new duties"). This is in sharp contrast to many other sections of the 2006 Order, which made amendments to the Commission's prior legislative rules and thus were presaged by a notice of proposed rulemaking and reflected in amendments to codified regulations. For example, just a few pages prior to the "offers for free

goods and services and informational messages" discussion, the Commission noted that it had "sought comment in the [Junk Fax Prevention Act] NPRM" on how to allocate responsibility for transmission of unsolicited faxes between third party agents or broadcasters, on the one hand, and the requesting entity, on the other. 21 FCC Rcd. at 3807. The Commission then answered that question by concluding that "the sender is the person or entity on whose behalf the advertisement is sent," *id.* at 3808; "adopt[ed] a definition of sender for purposes of the facsimile advertising rules," *id.*; and codified just such a definition in its rules, *see* 47 C.F.R. § 64.1200(f)(8) (2006) ("The term *sender* for purposes of paragraph (a)(3) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement"). The Commission did nothing like this with respect to "offers for free goods and services and informational messages." It said only that it was responding to petitions for clarification and reconsideration that had been filed in response to the 2003 order, 21 FCC Rcd. at 3814 nn.185 & 187, 3815 n.188, and offered views of the law that bore on the issues raised by the petitioners. The Commission did not codify its views in its TCPA regulations.

For all these reasons, the Commission's interpretation of 47 U.S.C. § 227(a)(5), as applied to "offers for free goods and services and informational messages," is properly categorized as a non-binding interpretive rule or policy statement. Accordingly, the Commission's interpretation was not reviewable under 47 U.S.C. § 402(a) or the Hobbs Act, and the district court's review of the Commission's interpretation raised no jurisdictional questions respecting the Hobbs Act. Because the Commission's interpretation is not

binding, the district court was not obliged to apply it, and was instead free to interpret the TCPA in light of its text and context and—correctly—to grant PDR's motion to dismiss Carlton & Harris's statutory damages claims.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 8, 2019

APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture or the Secretary of Transportation;

(C) the Administration, when the order was entered by the Maritime Administration;

(D) the Secretary, when the order is under section 812 of the Fair Housing Act; and

(E) the Board, when the order was entered by the Surface Transportation Board.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

28 U.S.C. § 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

28 U.S.C. § 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

28 U.S.C. § 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

28 U.S.C. § 2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 U.S.C. § 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate

stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

28 U.S.C. § 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(2) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

28 U.S.C. § 2351. Enforcement of orders by district courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued under section 193 of title 7.

47 U.S.C. § 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

* * *

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

47 U.S.C. § 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

* * *

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

* * *

REGULATORY APPENDIX

Federal Communications Commission (F.C.C.)

Report and Order and Third Order
on Reconsideration

IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

CG Docket No. 02-278

FCC 15-24

JUNK FAX PREVENTION ACT OF 2005

CG Docket No. 05-338

FCC 06-42

Adopted: April 5, 2006

Released: April 6, 2006

By the Commission:

* * *

4. Offers for Free Goods and Services and Informational Messages

52. We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements un-

der the TCPA's definition.[185] In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services."[186] Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

53. By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in a newsletter does not convert the entire communication into an advertisement.[187] Thus, a trade organization's newsletter

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187 *See* Air Conditioning Contractors Petition for Reconsideration at 2-3, filed August 12, 2003. In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a *bona fide* "informational communication." In determining whether the advertisement is to a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the

sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. We emphasize that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. We will review such newsletters on a case-by-case basis should they be brought to our attention.

54. Finally, we conclude that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules.[188] The TCPA's definition of "unsolicited advertisement" applies to any communication that advertises the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey.[189]

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communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender.

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